Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 14, 1994

Honorable Libby Linebarger
Chair
Committee on Public Education
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-020

Re: Clarification of Letter Opinion No. 93-70 (ID #23201)

Dear Representative Linebarger:

You have asked that we clarify Letter Opinion No. 93-70 with regard to "the application of the common-law doctrine of incompatibility to members of the board of directors of the Edwards Aquifer Authority established under S.B. 1477."[1] In that opinion, we stated that, among other things,

> the common-law doctrine of incompatibility disqualifies all officers who have the appointing power from appointing themselves to a different position. *Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); *St. Louis Southwestern Ry. Co. of Texas v. Naples Indep. Sch. Dist.*, 30 S.W.2d 703, 706 (Tex. Civ. App.--Texarkana 1930, no writ); Attorney General Opinions JM-934 (1988) at 3; C-452 (1965) at 3; O-410 (1939) at 5-9. As the Texas Supreme Court has stated:
>
> > It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.
>
> *Ehlinger*, 8 S.W.2d at 674. Thus, unless a specific statute provides otherwise, a public governing body must not appoint one of its members to an office or position while that person remains a member of the governing body. Attorney General Opinion C-452 at 3; *see* Attorney General Opinion JM-1157 (1990) at 3. Any appointment that contravenes this common-law principle is void as a matter of

[1]We note that by letter dated November 19, 1993, the United States Department of Justice concluded that the State of Texas had not met its burden to show that Senate Bill 1477, insofar as it replaced the elected board of the Edwards Underground Water District with the appointed board of the Edwards Aquifer Authority, complies with the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The State has requested the Department of Justice to clarify the scope of its objection to Senate Bill 1477.

> law. *Ehlinger*, 8S.W.2d at 673-74; *St. Louis Southwestern Ry. Co. of Texas*, 30 S.W.2d at 706; Attorney General Opinion C-452 at 4. *See generally* Letter Opinion No. 92-8 (1992).

Letter Opinion No. 93-70 (1993) at 3-4.

You disagree with our application of the common-law principle stated in *Ehlinger* and other sources to the various governmental bodies authorized to appoint members to the board of directors of the Edwards Aquifer Authority (the "EAA"). You point out that *Ehlinger* involved a county commissioners court which appointed its presiding officer to a position over which the commissioners court had the duty of supervision and control. You "do not see how [the Texas Supreme Court's holding in *Ehlinger*] would apply to a commissioners[] court, or city council, or county underground water conservation district board appointing one of its members to an independent entity not subject to its supervision and control such as the Edwards Aquifer Authority Board."

You also distinguish *St. Louis Southwestern Railway Co. of Texas*, which involved a school board that appointed all of its members to the board of equalization for property tax valuations for the school district. You state that the court rejected this appointment "because it defeats the implied purpose of a statute which allowed the school board to establish a board of equalization separate from itself. [You] know of no express or implied purpose in the Edwards Aquifer Authority Act to require members of commissioners courts, city councils[,] and county underground water conservation district boards to exclude themselves as possible appointees to the Edwards Aquifer Authority Board." On similar grounds, you distinguish Attorney General Opinion JM-934 (1988), which concluded that an independent school district board of trustees could not appoint its members to the college system board "when the enabling statute requires the two boards to be separate."

In conclusion, you suggest "that a more accurate statement of this facet of the incompatibility doctrine is that the governing body of a governmental entity cannot make an appointment from among its members to a position over which the governing body has supervision and control, or in contravention of a law which is intended to insure separation between the governing body and the appointed position." You therefore believe "that neither of these disqualifying criteria . . . prevent a commissioners[] court, city council, or county underground water conservation district board from appointing one of its members to serve on the Edwards Aquifer Authority Board." We do not agree.

For purposes of this opinion, we will accept your characterization of the facts in *Ehlinger* and *St. Louis Southwestern Railway Co. of Texas*. Even so, in both cases the courts did not limit to the facts before them their articulation of the common-law principle disqualifying all officers who have appointing power for appointment to the offices to which they may appoint. Rather, the courts state the principle broadly, as an absolute rule. Indeed, the Texas Court of Civil Appeals in *St. Louis Southwestern Railway Co. of Texas*

quoted, as a source for the principle, 46 CORPUS JURIS section 43, at 940, which states as follows:

> It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

See also 67 C.J.S. *Officers* § 23, at 269; 60 TEX. JUR. 3d *Public Officers and Employees* § 35, at 385 (1988). This statement does not limit the prohibition in any way. It also suggests that an officer should not use the appointment power to benefit himself or herself, regardless of any incompatibility between the offices of the appointing power and the appointee. *See* 63A AM. JUR. 2d *Public Officers and Employees* § 100, at 743 (stating that appointing officer should exercise appointment power with disinterested skill). Likewise, this office never has limited its statement of the common-law principle to the facts before it in any particular situation. *See, e.g.*, Attorney General Opinions JM-934 (1988) at 3; C-452 (1965) at 3-4; O-789 (1939) at 3.

For purposes of this letter, however, we will assume for the sake of argument the correctness of your conclusion that the common-law principle precluding a governing body from appointing one of its members applies only if the position to be appointed is one over which the governing body has supervision and control, or if the appointment would contravene a law that is intended to ensure separation between the governing body and the appointed position. We concede that the various governmental bodies that the statute requires to appoint members to the EAA board of directors lack the authority to supervise and control the EAA board, but we cannot conclude that the legislature did not intend to ensure that the governing body and appointed position be separate.

As we indicated in Letter Opinion No. 93-70, a statute may overcome the common-law principle prohibiting an official board from appointing one of its own members to another office if the statute does so expressly. *See also St. Louis Southwestern Ry. Co.*, 30 S.W.2d at 706. The statute creating the EAA does not express such an intent. *See* Acts 1993, 73d Leg., ch. 626, § 1.09, at 2353, 2359. In addition, we found no legislative history indicating that the legislature intended to overcome this well-established common-law principle. Furthermore, the legislature indeed may have intended that the members of the EAA board be free of the political pressures to which elected politicians are subject. The EAA's enabling act provides that the members of the EAA board shall be appointed, not elected. *See id.* § 1.09(d). Additionally, the EAA board is charged with, among other things, regulating permits for the withdrawal of water from the Edwards Aquifer and collecting fees from users of the Edwards Aquifer and downstream water rights holders. *See id.* §§ 1.15(c), 1.29. To perform these duties in a way that will "conserve, preserve, and protect the aquifer," *id.* § 1.08(a), an EAA board member may be required to act in a way that may compromise his or her interests as a resident of a particular city or county. Such an action may cost a member of a county commissioners

court, city governing board, or underground water district when the next election rolls around, although he or she would not be removed from the EAA board.

You state that our conclusion calls into question "the practice of many local governing bodies to appoint representatives to regional planning commissions, boards, county appraisal district boards and similar independent agencies from among their own members." You do not cite specific commissions or boards; thus, we cannot determine whether the relevant enabling statutes expressly overcome the common-law principle prohibiting an official board from appointing one of its own members to another office. *See St. Louis Southwestern Ry. Co.*, 30 S.W.2d at 706. We note, however, that section 6.03(a) of the Tax Code, which provides for the creation of a board of directors of an appraisal district, expressly states that "[t]o be eligible to serve on the board of an appraisal district established for a county having a population of at least 200,000 bordering a county having a population of at least 2,000,000 and the Gulf of Mexico, an individual must be *a member of the governing body* or an elected officer of a taxing unit entitled to vote on the appointment of board members under this section." (Emphasis added.)

Similarly, chapter 391 of the Local Government Code authorizes local governmental units to join into regional planning commissions. Section 391.006 of that chapter provides that at least two-thirds of the members of the governing body of a regional planning commission must be elected officials of the participating counties or municipalities. Additionally, sections 534.002 and 534.003 of the Health and Safety Code relate to the composition of boards of trustees of community mental health centers that one or more local governments have established. *See* Health & Safety Code § 534.001. The board of trustees may be the local agency's governing body or be appointed by the governmental body. *Id.* § 534.002 (pertaining to mental health center that one governmental body has established); *see id.* § 534.003 (providing that members of board of mental health center that two or more local agencies have established shall be appointed either from members of governing bodies establishing the center or from qualified voters). Thus, in certain situations, the legislature clearly has chosen to overcome the common-law principle at issue here.

Finally, you state that "[i]f Letter Opinion No. 93-70 is taken at face value" a particular provision in the San Marcos City Charter "would seem to be of no force or effect." The San Marcos City Charter provision to which you refer provides as follows:

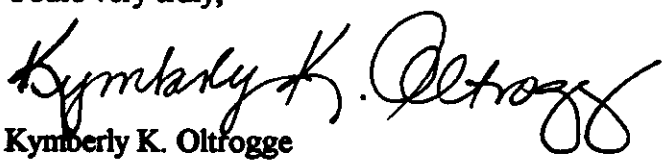
> Each member of the city council, in addition to having other qualifications prescribed by law, shall not hold any other office or employment under the city government while a member of said council, except a member of the city council may be appointed by the city council to represent said council on any board, commission, committee, organization or entity in the council's sole discretion so long as that person's service does not extend beyond his or her council term.

This office does not construe municipal charters. Attorney General Opinion JM-846 (1988) at 1. We disagree, however, with your assertion that our adherence to the well-established common-law principle disqualifying all members of a public governing body from positions the body appoints necessarily voids this provision of the San Marcos City Charter. In Attorney General Opinion JM-1087 (1989) this office concluded that, with regard to two city offices, a home-rule municipality may overcome the common-law doctrine of incompatibility by means of a provision in its city charter. Accordingly, assuming that San Marcos is a home-rule municipality, this provision in its city charter overcomes the common-law principle prohibiting an official board from appointing one of its own members to another city office; it does not, however, overcome the common-law principle when one of the offices is a regional office.[2]

S U M M A R Y

The common-law principle that disqualifies all members of a public governing body with the appointing power from appointing themselves to a different position, applies to each governmental body that Acts 1993, 73d Leg., ch. 626, § 1.09(b), at 2359, requires to appoint a member for the board of directors of the Edwards Aquifer Authority.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee

---

[2]Indeed, the language of the city charter provision you cite appears to contemplate this by referring only to other offices or employments "under the city government" that a city council member may hold.

Incidentally, we note that the city charter provision you cite precludes the city council from appointing one of its members to a position unless "that person's service does not extend beyond his or her council term." Because a member of the EAA board is appointed to serve a term of a specified length (in general, four years), a city council member might lose his or her seat on the city council but still be a member of the EAA board, unless the city council member has been elected for a term longer than four years. Article XI, section 11 of the Texas Constitution provides that a home-rule city may provide by charter for two year to four year terms of office for its city officers. Thus, if members of the San Marcos city council are elected for terms shorter than four years, this provision in the San Marcos City Charter appears to prohibit the San Marcos city council from appointing one of its members to a board such as the EAA board.